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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Consent of Filing 1

Interest of *Amicus Curiae* 1

Summary of Argument 3

ARGUMENT 3

I. THE RECENT DECISION OF THE THIRD CIRCUIT CONFLICTS WITH A DECISION OF THE TENTH CIRCUIT AND A DECISION OF THIS COURT 3

II. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE TITLE INSURERS' UNDERWRITING ACTIVITIES ARE THE BUSINESS OF INSURANCE 7

III. IF UNDERWRITING ACTIVITIES ARE NOT THE BUSINESS OF INSURANCE, REGULATORS WILL BE PREVENTED FROM ENFORCING STATE INSURANCE LAWS.... 9

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Commander Leasing Company v. Transamerica Title Insurance Company, 477 F.2d 77 (10th Cir. 1973).. 2, 5, 6

Federal Trade Commission v. Ticor Title Insurance Company, ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)..... 5

Group Life and Health Insurance Company v. Royal Drug, 440 U.S. 205 (1979).....7, 9

National Business Association Trust v. Morgan, 770 F.Supp. 1169 (W.D.Ky. 1991) 10

Ticor Title Insurance Company v. Federal Trade Commission, 922 F.2d 1122 (3d Cir. 1991) 5, 8

Ticor Title Insurance Company v. Federal Trade Commission, 998 F.2d 1129 (3d Cir. 1993) 1, 4, 5

Union Labor Life Insurance Company v. Pireno, 458 U.S. 119 (1982) 9

United States v. Home Title Insurance Company, 285 U.S. 191 (1932) 2, 6

STATUTES

15 U.S.C.A. § 45 (Supp. 1993)..... 4

McCarran-Ferguson Act,
15 U.S.C.A. § 1011 et seq. (1976)..... 7

15 U.S.C.A. § 1012 (1976) 4, 7

29 U.S.C.A. § 1144 (Supp. 1993)..... 10

Ky. Rev. Stat. 304.13-031(1)(b) 10

Ky. Rev. Stat. 304.22-020(2)..... 10

TABLE OF AUTHORITIES - Continued

Page

COURT RULES

Rule 10, Rules of the Supreme Court of the United States 3

OTHER AUTHORITIES

NAIC Unfair Trade Practices Act § 4G 10

"U.S. Government efforts to Combat Fraud and Abuse in the Insurance Industry-Interim Report on Combating Fraud and Abuse In Employer-Sponsored Health Benefit Plans," Senate Report 102-262 (1992) 10

CONSENT TO FILING

Both Petitioners and Respondent have consented to the filing of this brief of *amicus curiae.*

INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners ("NAIC") is a nonprofit, unincorporated association whose members are the principal insurance officials of the fifty states, the District of Columbia, territories, and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objective to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

The Executive Committee of the NAIC, which consists of sixteen insurance commissioners from all regions of the country, voted to file a brief of *amicus curiae* in this action on behalf of the full NAIC membership. The interest of the NAIC in filing this brief is based on the commissioners' collective interest in soliciting a decision by the Supreme Court of the United States to reconcile conflicting opinions of two different United States Courts of Appeals and to reconcile an opinion of a United States Court of Appeal which conflicts with an opinion of the Supreme Court of the United States.

In *Ticor Title Insurance Company v. Federal Trade Commission*, 998 F.2d 1129 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit held that the

establishment by title insurers of fees for title searches and examinations was not insulated from federal antitrust laws because title searches and examinations are not part of the "business of insurance."

This decision conflicts with the decision of the United States Court of Appeals for the Tenth Circuit in *Commander Leasing Company v. Transamerica Title Insurance Company*, 477 F.2d 77 (10th Cir. 1973), in which it was held that the business of title insurance cannot be fragmented by treating title searches and examinations as separate from the issuance of a policy of title insurance.

Further, the decision of the United States Court of Appeals for the Third Circuit conflicts with the decision of the Supreme Court of the United States in *United States v. Home Title Insurance Company*, 285 U.S. 191 (1932), in which it was held that a title insurer is an "insurance company" for the purposes of federal tax laws in spite of the fact that the premium for title insurance includes fees for examinations, searches, and other services incident to the issuance of title insurance.

Artificial division of insurance transactions which leads to insurance activities being defined as not part of the business of insurance and placed beyond the authority of state insurance regulators is of great concern to NAIC members, who are charged with regulating the business of insurance. Insurance commissioners encourage the Court to reverse the Third Circuit's decision to divide insurance transactions into pieces, declare the pieces to not be part of an insurance transaction, thus placing those transactions beyond the scope of regulation by insurance commissioners.

SUMMARY OF ARGUMENT

It is the policy of Congress that continued regulation and taxation by the several states of the business of insurance is in the public interest. The insurance commissioners have authority under state law and the policy of Congress to regulate the business of insurance and all persons engaged in the insurance business. The Third Circuit's decision creates artificial distinctions between aspects of the title insurance business, the result being that title insurers' underwriting and rating activities are not considered to be part of the business of insurance, effectively placing those underwriting activities beyond the reach of state insurance regulators.

The Third Circuit's decision is contrary to a decision of the United States Court of Appeals for the Tenth Circuit and a decision of the United States Supreme Court. The Court should use this opportunity to eliminate these conflicts by reversing the Third Circuit's decision, which fragments insurance transactions into pieces and finds that some of those pieces do not involve insurance, thereby restricting the ability of state insurance regulators to carry out their duties.

ARGUMENT

I. THE RECENT DECISION OF THE THIRD CIRCUIT CONFLICTS WITH A DECISION OF THE TENTH CIRCUIT AND A DECISION OF THIS COURT.

Rule 10 of the Rules of the Supreme Court indicates that when a United States Court of Appeals has rendered

a decision in conflict with a decision of another United States Court of Appeals on the same matter, it is appropriate for this Court to grant a petition for a writ of certiorari. Rule 10 further indicates that it does not provide a complete list of reasons for granting a petition for a writ of certiorari, and the fact that a United States Court of Appeals has rendered a decision in conflict with a decision of this Court is a sufficiently special and important reason for the grant of such a petition.

The *Ticor Title* case originated when the Federal Trade Commission ("FTC") issued an administrative complaint against several title insurers, charging the title insurers with price fixing of fees for title searches and examinations, alleging that this is an unfair method of competition in or affecting commerce and an unfair or deceptive act or practice affecting commerce, in violation of 15 U.S.C.A. § 45 (Supp. 1993). The rating practices in question involved uniform rates established by a state licensed rating bureau. Rate filing proposals were submitted to the governing state insurance regulators and became effective unless state officials rejected them in a timely manner (in the states still at issue, the rates were affirmatively approved by state insurance regulators). The title insurers challenged the jurisdiction of the FTC, claiming that title searches and examinations are part of providing title insurance. Under 15 U.S.C.A. § 1012(b) (1976), there is a limited exemption from the antitrust laws sought to be enforced by the FTC.

The FTC concluded that underwriting activities such as title searches and examinations are not the "business of insurance" because they do not include risk spreading. The title insurers appealed to the Third Circuit, arguing

that their activities were immune under the state action doctrine. The Third Circuit held that the state action doctrine insulated the title insurers' title search and examination activities from the federal antitrust laws in question. *Ticor Title Insurance Company v. Federal Trade Commission*, 922 F.2d 1122 (3d Cir. 1991). This Court reversed the Third Circuit, holding that, in some states, the regulatory scheme did not meet the definition of "state action," and remanded the case to the Third Circuit for a determination of whether laws of other states provided a defense under the state action doctrine. *Federal Trade Commission v. Ticor Title Insurance Company*, ___ U.S. ___, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992).

On remand, the Third Circuit held that title search and examination activities were not part of the business of insurance, and, therefore, subject to federal antitrust laws and that laws of certain states did not insulate the title insurers from antitrust laws. *See Ticor Title Insurance Company v. Federal Trade Commission*, 998 F.2d 1129, 1130-1133 (3d Cir. 1993).

In finding that title insurers' title search and examination activities were not part of the business of insurance, the Third Circuit reached a decision contrary to a decision of the Tenth Circuit in *Commander Leasing Company v. Transamerica Title Insurance Company*, 477 F.2d 77 (10th Cir. 1973). In *Commander Leasing Company*, the plaintiffs alleged that title insurers violated federal antitrust laws through their collective rating for title searches and examinations. The title insurer argued that title searches and examinations were part of the business of title insurance. The plaintiffs argued that title searches and examinations were not the business of insurance. The Court

stated that " . . . we are of the view that the business of title insurance cannot be thus fragmented in the manner sought by counsel." *Commander Leasing Company*, 477 F.2d at 82. The Court went on to conclude that title insurance is insurance as that word is used in the McCarran-Ferguson Act and that its conclusion was not altered by the fact that prior to issuance of a title insurance policy, title insurers make an examination of the title and include a charge for that examination in the rate ultimately charged the purchaser. *Commander Leasing Company*, 477 F.2d at 83.

The Tenth Circuit noted that, in *United States v. Home Title Insurance Company*, 285 U.S. 191 (1932), it was held that a title insurer is an "insurance company" for the purposes of federal tax laws. The Tenth Circuit paid particular attention to the fact noted by the United States Supreme Court that preliminary to the issue of title insurance, title insurers prepared abstracts and made an examination of the title and that premium charges are based in part on fees for examinations, searches, and other services incident to the transaction. This Court concluded that " . . . it does not appear that any substantial part of its transactions was not connected with or the outgrowth of insurance." *United States v. Home Title Insurance Company*, 285 U.S. at 192, 193, 195.

When the Third Circuit decided to split title insurance transactions into pieces and conclude that certain of those pieces do not constitute the business of insurance, its holding was in conflict with the Tenth Circuit's decision in *Commander Leasing Company* and the decision of this Court in *United States v. Home Title Insurance Company*. This conflict justifies granting the petition for a writ of certiorari in this case.

II. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE TITLE INSURERS' UNDERWRITING ACTIVITIES ARE THE BUSINESS OF INSURANCE.

Since underwriting activities such as title insurers' title searches and examinations are part of the business of insurance, the Court should grant the petition for writ of certiorari. Under the McCarran-Ferguson Act, 15 U.S.C.A. § 1011 et seq. (1976), Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest. 15 U.S.C.A. § 1012 (1976) provides as follows:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law (italics in original).

The McCarran-Ferguson Act does not define the phrase "business of insurance." In *Group Life and Health*

Insurance Company v. Royal Drug, 440 U.S. 205 (1979), and *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119 (1982), this Court identified three items which must be applied to determine whether a practice involves the business of insurance under the McCarran-Ferguson Act:

- whether the practice has the effect of transferring or spreading a policyholder's risk;
- whether the practice is an integral part of the policy relationship between the insurer and the insured; and
- whether the practice is limited to entities within the insurance industry. *Union Labor Life Insurance Company v. Pireno*, 458 U.S. at 129.

The Court has emphasized that none of these criteria is necessarily determinative in itself. *Id.*

The Third Circuit went astray in concluding that title search and examination activities have nothing to do with the actual performance of the title insurance contract. *Ticor Title Insurance Company v. Federal Trade Commission*, 998 F.2d at 1136. In fact, title insurers' title searches and examinations are part of title insurers' underwriting. In other words, title insurers use title searches and examinations to decide whether applicants for title insurance will be permitted to enter the pool of insureds whose risks are shared, and if so, under what conditions.

Risk selection is at the heart of the insurance business. Insurers determine the nature of a risk, and good risks are accepted and granted favorable conditions and rates while poor risks are rejected, made subject to unfavorable conditions, or charged higher rates. Thus, the Third Circuit's conclusion that underwriting activities

such as title insurers' title search and examination activities are not part of the business of insurance has an air of unreality which calls for this Court to grant the petition for writ of certiorari.

Further, these underwriting and rating activities easily fall within the definition of the business of insurance set forth in *Royal Drug* and *Pireno*. Underwriting activities have the effect of transferring or spreading a policyholder's risk in that underwriting is the process by which insurers determine whether applicants will be permitted to enter the pool of risks, and if so, under what conditions. Secondly, underwriting activities are an integral part of the policy relationship between the insurer and the insured because they are the processes by which the insurer determines whether a person will be insured, and if so, on what terms. Thirdly, only insurers use underwriting activities to determine whether insurance should be issued, and if so, on what terms. Lastly, even if title searches and examinations do not meet fully one of these criteria, this is not necessarily determinative that the activities do not involve the business of insurance. *Union Labor Life Insurance Company v. Pireno*, 458 U.S. at 129.

III. IF UNDERWRITING ACTIVITIES ARE NOT THE BUSINESS OF INSURANCE, REGULATORS WILL BE PREVENTED FROM ENFORCING STATE INSURANCE LAWS.

Holding that underwriting activities are not part of the business of insurance will restrict the ability of state insurance regulators to enforce rating and trade practices

provisions. For example, most states prohibit rates which are unfairly discriminatory (*see, e.g.*, Ky. Rev. Stats. 304.13-031(1)(b) and 304.22-020(2)). Also, most states have trade practices statutes prohibiting unfair discrimination similar to § 4G of the NAIC Unfair Trade Practices Act (Appendix A; unfair discrimination laws prohibit insurers from making irrational distinctions in classifying policyholders).

Underwriting activities are the means by which insurers classify insureds to determine if insurance will be issued, and if so, on what terms. These are the processes by which insurers spread risks. If they are not the "business of insurance," major portions of state insurance laws would be preempted by Federal Laws and state insurance regulators would lose the ability to enforce these provisions as to any kind of insurance.

Further, broad federal preemption of state insurance regulators' authority has a checkered past. One need only look into the chamber of horrors created by the Employee Retirement Income Security Act preemption provision, 29 U.S.C.A. § 1144 (Supp. 1993), to find thousands of people with millions of dollars of unpaid health insurance claims due to the activities of health plans transacting unauthorized insurance because of a "gray area" created by the preemption provision. *See National Business Association Trust v. Morgan*, 770 F.Supp. 1169 (W.D.Ky. 1991); "U.S. Government efforts to Combat Fraud and Abuse in the Insurance Industry-Interim Report on Combating Fraud and Abuse In Employer-Sponsored Health Benefit Plans," Senate Report 102-262 (1992). This Court should

act to avoid the creation of another gray area with the potential for ruining more lives.

CONCLUSION

The decision of the Third Circuit that title insurers' underwriting activities, such as title searches and examinations, are not part of the business of insurance creates an artificial definition of what constitutes the business of insurance. Once such artificial definitions are created, transactions which are insurance business are placed beyond the reach of state insurance regulators, who are prevented from performing their duties of regulating the business of insurance in the United States. Indeed, if the reasoning of the Third Circuit were to proliferate, it would affect every kind of insurance business. State insurance regulators would be prevented from protecting the public because they would not have authority to regulate all of the insurance activities of an insurance company. Lastly, broad federal preemption of state insurance laws has not had a favorable impact on the public and must be used cautiously.

The National Association of Insurance Commissioners urges the Court to grant the petition for writ of certiorari and reverse the decision place aspects of the business of insurance beyond the authority of state insurance regulators.

Respectfully submitted,

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APPENDIX A

NAIC UNFAIR TRADE PRACTICES ACT

Section 4. Unfair Trade Practices Defined

Any of the following practices, if committed in violation of Section 3, are hereby defined as unfair trade practices in the business of insurance: . . .

G. Unfair Discrimination.

(1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.

(2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.

Drafting Note: In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes, this paragraph should be omitted.

(3) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazard by refusing to

insure, refusing to renew, cancelling or limiting the amount of insurance coverage on a property or casualty risk solely because of the geographic location of the risk, unless such action is the result of the application of sound underwriting and actuarial principles related to actual or reasonably anticipated loss experience.

(4) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to insure, refusing to renew, cancelling or limiting the amount of insurance coverage on the residential property risk, or the personal property contained therein, solely because of the age of the residential property.

(5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.

(6) To terminate, or to modify coverage or to refuse to issue or refuse to renew any property or casualty policy solely because the applicant or insured or any

employee of either is mentally or physically impaired; provided that this subsection shall not apply to accident and health insurance sold by a casualty insurer and, provided further, that this subsection shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance or renewal of any insurance policy or contract.

(7) Refusing to insure solely because another insurer has refused to write a policy, or has cancelled or has refused to renew an existing policy in which that person was the named insured. Nothing herein contained shall prevent the termination of an excess insurance policy on account of the failure of the insured to maintain any required underlying insurance.

(8) Violation of the state's rescission laws at [insert reference to appropriate code section].

Drafting Note: A state may wish to include this section if it has existing state laws covering rescission and to insert a reference to a particular code section.

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